Supreme Court, U.S.
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NO. 87-1593

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GERALD R. DAUGHERTY, ET AL,
Petitioners

versus

AT&T TECHNOLOGIES, INC. AND
COMMUNICATIONS WORKERS OF AMERICA
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Question Presented for Review

The questions presented for review are:

1. Whether plaintiffs raised any genuine issues of fact or law in opposition to defendants' motion for summary judgment.

2. Whether the Court erred in finding that collective bargaining Article 20 (layoff) did not apply.

3. Whether the Court erred in finding that collective bargaining Article 13, 2.91 (permanent transfer) applied and if it applied, that its procedure was properly followed, i.e., that plaintiffs' skills need only be "utilized" (not "required") at their new work location.

4. Whether the Court erred in finding that the Union had not acted arbitrarily and capriciously in reversing its position on the procedure under Article 13, 2.91, formerly used to require "matching" surplus with scarcity.

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REFERENCE TO OPINION REPORT

There was no opinion reported.

STATEMENT OF JURISDICTION

(i) The date of the judgment is October 13, 1987 and its time of entry is October 13, 1987.

(ii) The statute conferring jurisdiction on this Court to review the judgment by Writ of Certiorari is Section 1254, Judicial Code.

STATEMENT OF THE CASE

Plaintiffs filed suit on June 27, 1985. Defendants' Motion for Summary Judgment was granted January 14, 1987. That

judgment was affirmed without opinion on October 13, 1987.

STATEMENT OF FACTS

a) Plaintiffs and their contract:

(1) In July, 1984 plaintiffs were installers employed by AT&T and were members of the Communication Workers of America Union, Local 10490. They were working under a contract dated August 23, 1983. (p. 193).

(2) Lodriguss had been employed 14-1/2 years; Saladino 19 years (p. 248); and Daugherty also 19 years. (p. 256).

(3) On July 12, 600 surplus installers, including plaintiffs, were notified of permanent transfers to New York City. (p. 626).

(4) Art. 13 (p. 217-229) specifically sec. 2.91 (p. 218-19) governs permanent transfer and reads as follows:

> 2.91 Employees will be selected for permanent transfer as follows:
>
> (a) The Company will select, by inverse order of Term of Employment, Employees assigned to the Base Location from which such transfer is to be made who have the skills as determined by the Company in the

skill category required at the destination location...(Emph. added)

(5) Art. 20 (Adjustments to the Working Force) (p. 238-9) applies to lay-offs as indicated by the following article, Article 21 titled Lay-off Allowance. (p. 239).

(6) Art. 20, sec. 1 allows "re-assignment of personnel or the addition to, or decrease in the working force." It does not refer to "transfer." The terms "assignment" and "transfer" are distinguished in Art. 13, secs. 1.8 and 1.9 respectively. (p. 217).

(7) Art. 20 required surpluses to be relieved by laying off junior employees in inverse order of seniority as shown on a nationwide list from wherever they were stationed, regardless whether they were surplus. Senior surplus employees would then be "re-assigned" to vacancies at the several locations, again in inverse order. (p. 238-9).

(b) Permanent Transfers Rejected as force reduction means in 1983 contract - company and union use it regardless:

(8) Because the company's surplus conditions had been growing in the installation department, the Joint Union/Company Committment Committee met on July

2, 1984 to deal with the surplus. (Labor Relations Bulletin, July 20, 1984; p. 625-6).

(9) The Bulletin reviewed the history of recent efforts to eliminate the surplus. The union's proposal to eliminate the surplus was to lay off voluntarily surplus installers at several local work locations and then permanently transfer nationwide any remaining "surplus skills (employees)" to several other areas where installers with less than 10 years would be laid off - "bumped". (For convenience, these are termed 10-year employees).

(10) As the company stated in the Bulletin, the union proposed "permanent transfer as a means of force adjustment." This proposal was "rejected" in the 1983 contract negotiations and was not included in that contract. (p. 625) (As noted above, Art. 20 does not mention transfers of any kind as a means of force re-adjustment. Art. 13 does not allow permanent transfer of an employee in combination with "bumping" to wherever his skills might be "utilized". The term "utilized" does not appear in Art. 13.)

(c) History of arbitration interpretation of Art. 13, Sec. 2.91 - surplus matched to scarcity:

(11) Two 1982 arbitration awards interpreted a provision in the 1980 contract, identical to the one here at issue.

(12) The Duff opinion (re transfer of union representatives) recited the history of sec. 2.91 (a) since 1974. The arbitrator found, as did the Court in part, (para. 3, p. 668), that

> ...Article 13, Section 2.91 obligates the Company to select for permanent transfer surplus workers in any area for movement to a destination location where a scarcity exists by inverse order of their term of employment, provided they possess the skills ... required. (emph. added)

(13) The Court's opinion below (para. 3, p. 668) apparently tracks the above cited language from the Duff opinion, but omits completely mention of "scarcity" and requirement.

(14) The Duff opinion also found that AT&T had used 2.91 (1) in 1982 to permanently transfer 285 installers to:

> ... destination locations in Regions where they were needed. Mary Lou Abbot, Eastern Region Department Chief of Person-

> nel for the company, fulfilled the obligation of making the initial determination of Installers who would be listed for each permanent transfer. She matched the number of surplus employees available in the Eastern Region with the index and skill categories required at the destination location... (p. 448) (Emph. added)

(15) This permanent transfer procedure was used in the context of a surplus in one area and a scarcity in another:

> "Variations in consumer demand experienced in the various geographical areas served by this Company caused a surplus of Installers to exist in the Eastern Region and a scarcity of Installers in certain skill levels in California, Nevada, New York and New Jersey." (p. 448) (Emph. added)

(16) The context for the 1982 application of sec. 2.91 (a) was testified to at the arbitration hearing by Phil C. Padgett, National Director for the Installers Bargaining Unit. He testified that he attended a meeting with company representatives at which it explained that "work was available at the destination locations..." (p. 449).

(17) Again at issue in the Fisher opinion (p. 461-470) was the permanent transfer of 367 employees in 1982 among whom were also union representatives.

(18) The arbitrator, referring to the Duff opinion concerning the Eastern Region, noted that in "selecting the employees for permanent transfer the Company utilized the same procedure which had been followed in the Eastern Region." (The Fisher opinion involved permanent transfers from the Southern Region.)

d) AT&T and Union agree permanent transfer is proper to adjust work force:

(19) The company implemented a plan similar, but not identical, to the "rejected" union plan. The second and third features of the company plan were:

2. Permanent transfers of surplus employees as proposed the Union.
3. Lay-offs in accordance with provisions of the Contract as a result of Permanent Transfers which will most likely remove all Installers with under ten years of service. (p. 423).

(20) Accordingly, 600 surplus installers were notified of permanent transfer to New York City on July 12, 1984. (p. 423).

(21) The company plan had two significant, interrelated differences from the union plan - all 600 permanent transfers were to New York City, and to there only, not to scattered locations, and as a consequence, all "bump-

ing" (lay-offs) of junior employees would occur in New York City.

e) New York City - A nice place to visit, but not to work:

(22) AT&T (and presumably the union) knew that approximately fifty percent of permanently transferred employees gave up their jobs, but that "69% left the roll when the transfer was to the New York area." (Labor Relations Bulletin, May 7, 1984, p. 627).

f) Installers were picked for transfer locally (and there was no surplus in New Orleans):

(23) The permanent transfer selections were made in New Orleans to relieve a purported shortage. (Deposition of Anderson, p. 439). In fact, there was no surplus in New Orleans because AT&T installers began working overtime a week after plaintiffs were terminated. (Deposition of Daugherty, p. 484; deposition of Saladino, p. 441.)

g) New York City - No need for installers or their skills:

(24) When plaintiffs arrived in New York City they were told that they and their skills were not needed; all that were needed were "arms and legs"; and that for each installer who accepted permanent transfer a local in-

staller would be laid off. (Affidavit of Sweiger, p. 629-630); affidavit of Isadore, p. 498-99; depositions of Cliff Fernandez, p. 434-5; Anderson, p. 438-9).

(25) In fact, the company admitted in its Labor Relations Bulletin that it would lay off one New York City installer for each employee who accepted permanent transfer. (p. 626).

h) Union position and knowledge of 2.91 interpretation:

(26) The use of permanent transfers to reduce the work force had been rejected as a provision of the 1983 contract. (p. 625).

(27) Before July 12, 1984 2.91 had been expressly interpreted in the Duff opinion on the context of matching a surplus in one area to a scarcity in another before an employee was permanently transferred. (p. 418).

(28) In the Fisher opinion the situation was different:

> The transfer of the 367 employees was necessary because of a continuing shortage of work in the Southern Region. The need for Installers in New Jersey and other destination locations was not a motivative factor in the Company's initial decision. (p. 467)

(29) However, although the union did not at

first grieve the lack of matching, it eventually took the position that 2.91 required matching:

> The Union contention that the skill categories of the three officials were not required at the destination locations appears to be an afterthought. (p. 467)

(30) As late as November 30, 1984 the union had notified the company that it intended to arbitrate grievance No. 12290 of W. C. Cole, Jr. who complained under 2.91 that his skill category was not required at the destination location. The notice of the union's intent to proceed to arbitration was signed by A. D. Walker, CWA representative, who is the union's affiant in this case.

(31) The union determined plaintiffs' skills could be "utilized" and that an arbitrator would rule against their 2.91 grievance. (para. 24, p. 283; para. 26, p. 285; para. 21, p. 282).

ARGUMENT

Summary

During 1982, 1983 and mid-1984, AT&T had a continuing, nationwide surplus of installers. In 1984, the period affecting plaintiffs, there were 600 surplus installers.

During a surplus, AT&T was contractually obligated to use Art. 20 to "lay-off" 10-year employees according to a nationwide seniority list from the bottom up and then, to "re-assign" installers to these vacancies, again, in inverse order. However, AT&T misused Art. 13, 2.91 to "permanently transfer" all 600 surplus installers from several states (e.g., Louisiana, Oklahoma, Mississippi) only to New York City where they would probably "bump" all 10-year employees in order to work, and it did so brazenly without a showing of scarcity. Accordingly, while plaintiffs' skills could be "utilized" (defendants' position), they were not "required" (Art. 13, 2.91) at the destination location. If Art. 20 had been followed, "lay-off" employees would have been selected all over the U. S. not just in New York City, and "re-assigned" employees would have been selected in inverse seniority order, not by skills. None of plaintiffs (all senior employees) would have been reached. By avoiding Art. 20, AT&T could target older, senior employees, while saving the more junior employees (with more than 10 years service) who would have been required to transfer.

Both AT&T and the Union knew that the 600 employees were not "required" and that 69% (instead of the usual 50%) of the transferred employees would quit rather than move to New

York City, as admitted by AT&T and as stated in the company bulletin.* In effect, AT&T misused Art. 13 (permanent transfer) to lay off hundreds of employees. By using Art. 13, instead of Art. 20, AT&T violated the contract and it was error for the Court to allow the use of Art. 13 instead of Art. 20.

If it were proper in the first place to use Art. 13 in order to permanently transfer plaintiffs, then, under the contract, the Court should have found that their skills were required in New York City. (In other words, "matched" surplus with scarcity. Duff opinion.) The Court found only that their skills could be "utilized" and approved the use of Art. 13 without matching.

The Court could not find that plaintiffs' skills were "required" because the plaintiffs could work only by bumping junior, ten-year employees in New York City. There was no scarcity with which to match a surplus.

However, a "utilization"/bumping interpretation would allow the company to permanently transfer any employee anywhere - even to a surplus area - his skill could be utilized, even if they were not required. Such an interpretation would totally

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* By transferring all installers to New York City, the company also "got rid of" more senior employees and saved more junior employees.

nullify Art. 20 - nationwide layoff, followed by "re-assignment". The Court's interpretation of Art. 13, 2.91 nullifying Art. 20 was error.

Art. 13 has been referred to in two arbitration decisions - the Duff and Fisher opinions. These are the only documentary records of its use by AT&T and of the Union's interpretation. In 1982, AT&T used Art. 13 to permanently transfer/"match" installers where their skills were "required". (Arbitrator Duff). Later in 1982, AT&T did not match surplus to scarcity; it claimed only that the skills of the transferred employees could be "utilized". The Union objected. (Arbitrator Fisher). It never introduced any evidence to show when and how it changed its position before July, 1984.

Accordingly, it was error for the Court to find the Union was in good faith in acquiescing to the use of Art. 13.

ARGUMENT

The Courts must place a practical and realistic construction upon labor agreements. Teamsters Local Union No. 688 v. Crown Cork and Seal Co. (8th Cir. 1973) 488 F2d 738. The labor contract must be read as a whole. Mastro Plastics Corp. v. N.L.R.B. (1956) 76 S.Ct. 349, reh. den.

The company had no right to nullify Art. 20 and avoid

inverse order force adjustments by permanently transfering the plaintiffs under Art. 13, 2.91(a) unless they were bonafide surplus employees and were matched with a scarcity at the other end (destination location). The employees themselves, not merely their abstract, disembodied skills, had to be required, not merely usable after bumping another surplus employee. "Bumping" obviously shows there was no scarcity.

Article 13 was interpreted in exactly this fashion by Arbitrator Duff and the union in the Fisher opinion. In fact, permanent transfer as a means of forced reduction without matching a surplus to a scarcity, but instead bumping surplus 10-year employees, was rejected in the 1983 contract negotiations. Nevertheless, the union proposed this same means in the July, 1984 surplus reduction discussion. (The union proposal had the feature of making the permanent transfers to several locations around the country and acquiesced in the company-modified version.)

On July 12, 1984 the company "accepted" the union proposal, but modified it to permanently transfer all surplus employees to New York City only. Both the company and the union knew that in New York City, as elsewher, 10-year employees would get bumped, but they also knew that 69% (instead of 50%)

of the permanently transferred employees would quit. In other words, the company killed more birds with one stone - it got rid of 40% more surplus employees (near vested, if plaintiffs are any indication) by permanently transferring them to New York City instead of all over the country, and retained a correspondingly greater number of 10-year employees. By avoiding Art. 20, it protected its mid-seniority employees with more than 10 years service, but less than plaintiffs' terms.

On the other hand, defendants' contract interpretation is strained and far-fetched. They contend that Art. 20 does not apply and that if a permanently transferred employee's skill can be used even in a surplus area after bumping, then the contract is satisfied. Since most employees had several skills, any employee could be used in any area. This view, of course, totally ignores the provision of 2.91 that the employee's skill must be required. The use of the word required in the sense of scarcity is normal and natural, otherwise there would be few, if any restrictions on permanent transfer.

The company adopted, and the union acquiesced in, a permanent transfer/bumping plan which both knew had no support in prior arbitration history and which had been excluded

from and was not in the current contract. This conduct is a breach of the contract and duty of fair representation. In other words, the union "rolled over and played dead." Foster v. Bowman Transp. Co. (N.D. Ala., 1983) 562 F. Supp. 806.

The finding that the parties agreed that there was no contract violation is, by itself, insignificant. It points as much to collusion or amendment of the contract without membership ratification as to the correct interpretation. Price v. IBT (4th Cir. 1972) 657 F.2d 605, 610 held:

> ...(A)bsent appropriate amendment to the labor contract, there (can) be no changes in the agreement that would abrogate rights contained in it.

See also Shultz v. Owen-Illinois, Inc. (7th Cir. 1982) 696 F.2d 505, 509. The procedure for amending or at least notifying the membership was not followed when the union purportedly agreed with the company that there was no violation. Article 9A of the contract requires that the company and the union will apply the contract fairly in accord with its intent and meaning. This, by the clear documentary record, was not done. (Art. 9A is at p. 203.)

The union must administer the grievance procedure in good faith and in a non-arbitrary fashion. Vaca v. Sipes (1967) 87 S.Ct. 903, 917, 919.

The Fifth Circuit has held that the union's interpretation of a contract will be non-arbitrary where it is:

> (1) Based upon relevant, permissible union factors which excludes the possibility of it being based upon motivation such as personal animosity or political favoritism; (2) a rational result of the consideration of those factors; and (3) inclusive of a fair and impartial consideration of the interest of all employees. Tedford v. Peabody Coal Co. (5th Cir. 1976) 533 F2d 952, 957.

For a union to legally reject an arbitration request, its rejection

> must be based on 'an informed, reasoned judgment regarding the merits of the claim(s) in terms of the language of the collective bargaining agreement.' Karahalois v. Defense Language Institute (D.C. Cal. 1984) 613 F. Supp. 440, 447, citing cases.

The Court erred in finding (#6) that plaintiffs failed to establish that their skills were not required in New York City. The company itself admitted in its Labor Relations Bulletin that it would have to bump 10-year employees and plaintiffs were told this when they arrived in New York City. There was no scarcity such that plaintiffs' skills were required as there had been under the Duff opinion and the union position in the Fisher opinion and, apparently in the union's intent to arbitrate the Cole

grievance. Under the circumstances of at least one arbitrator (Duff) who would decide in its favor; the rejection of permanent transfer/bumping from the 1983 contract negotiations; and its intent to preserve the similar Cole grievance, the union was clearly arbitrary, capricious, and in bad faith in its refusal to arbitrate plaintiffs' grievance.

Rule 56(c) allows summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The standard for summary judgment is the standard for a directed verdict under FRCP 50(a). Celotex Corp. v. Catrett (1986) 196 S.Ct. 2548.

The Fifth Circuit has defined "genuine":

> An issue is genuine if the evidence supporting its resolution in favor of the party opposing summary judgment, together with any inferences in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of that party. If, on the other hand, the evidence offered by both moving and opposing parties would support only one conclusion and, even if all the evidence to the contrary is fully credited a trial Court would be obliged to direct the verdict in favor of the moving party, the issue is not genuine. Professional Managers, Inc. v. Fawer, Bryan, Hardy and Zatzkis (5th Cir., 1986) 799 F.2d 218,222.

A verdict for plaintiffs is supported by the inapplicability of Art. 13 and the obvious intent of the contract that Art. 20 should apply (p. 217, 238, respectively); the context of the use of Art. 13 as set out in the Duff opinion (p. 448); the union's own position in the Fisher opinion (p. 467); the rejection of permanent transfer/ bumping as a means of force reduction from the 1983 contract (p. 422); the union's proposal to use this method anyway in July, 1984 (p. 423); the company's modified use of the union proposal (p. 423) and the union's acquiescence (p. 286); the lack of a surplus or scarcity (items 23, 24 supra) and the showing of the union only that plaintiffs' skills were usable, not that they were required as termed in the contract. (p. 282).

CONCLUSION

The Courts below made the twin errors of allowing, first, AT&T to use Art. 13, 2.91 instead of Art. 20, and second, adopting a "utilization"/bumping concept for Art. 13, instead of a "requirement"/matching concept. The Courts further erred by finding that the Union's acquiesence was in good faith, both with respect to the substitution of Art. 20 for Art. 13 and the use of Art. 13 without showing "requirement".

The sum total of all the evidence does not point in only one direction and clearly no court would be obligated to direct

a verdict for defendants. There is genuine evidence that Art. 20, not Art. 13 applied; that Art. 13 was misused; and that the Union "caved in" by ignoring Art. 20 and reversing its earlier documented position about how Art. 13 actually worked.

Accordingly, it was clearly erroneous for the District Court to grant the Motions for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served the below listed parties by U. S. mail, first-class postage prepaid, with three (3) copies each of the foregoing:

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by René R. Nicaud

IN THE SUPREME COURT OF THE UNITED STATES
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AT&T TECHNOLOGIES, INC. AND
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PETITION FOR A WRIT OF CERTIORARI TO THE
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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3122

GERALD R. DAUGHERTY,

Plaintiff-Appellant,

versus

AT&T TECHNOLOGIES, INC., ET AL.,

Defendants-Appellees.

* * * * * * * * * * * * * * * *

JULES LODRIGUSS (Mrs.),
Administratrix for Jules Lodriguss,

Plaintiff-Appellant,

versus

AT&T TECHNOLOGIES, ET AL.,

Defendants-Appellees.

* * * * * * * * * * * * * * * *

BERNARD A. SALADINO,

Plaintiff-Appellant,

versus

AT&T TECHNOLOGIES, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

---

(October 13, 1987)

Before WISDOM, GARWOOD, and JONES, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

47.6. Affirmance Without Opinion

When the Court determines that any one or more of the following circumstances exists and is dispositve of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Curt also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Loc.R. 47.6" or "ENFORCED. See Loc.R. 47.6."
(Amended June 17, 1986).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GERALD R. DAUGHERTY, ET AL	CIVIL ACTION
versus	NO. 85-1731
AT&T TECHNOLOGIES, INC	c/w 85-2843, 85-2844 85-2845, 85-2846 & 85-2847 SECTION "B"

These consolidated matters are before the Court on the motions of defendants for summary judgment. Plaintiffs, former telephone installers, were employed by defendant, AT&T Technologies, Inc. (AT&T), and were former members of defendant union, Communications Workers of America (CWA). Plaintiffs have alleged a cause of action arising under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Plaintiffs claim that AT&T breached a collective bargaining agreement and that CWA unfairly represented them in connection with this breach of contract.

The Court, after considering the motions, oppositions hereto, the arguments of counsel and the applicable law, now rules GRANTING defendants' motions for summary judgment.

DATE OF ENTRY 14 JAN. 1987

FACTS

1. On August 28, 1983, defendants AT&T and CWA entered into a collective bargaining agreement, installation contract CWA-7 which expired on May 31, 1986.

2. Plaintiffs, as telephone installers, were members of a collective bargaining unit represented by the CWA and the terms and conditions of their employment were governed by the collective bargaining agreement between AT&T and CWA.

3. Article 13, Section 1 of the agreement provides that the character of installation work makes it necessary for employees to move to different locations and that AT&T would effect such moves by temporary and permanent transfers.

4. Article 13, Section 2.91 of the agreement provides that employees will be selected for permanent transfer by AT&T in inverse order of term of employment and who have "the skills as determined by the company in the skill category required at the destination location."

5. Installers are classified by one of five skill levels (indices). Index 1 is the least skilled and Index 5 is the most skilled. In addition, Index 4 and 5 installers are classified by communications systems on which they are qualified to work. Index 1-3 installers are transferred according to seniority. Index

4 and 5 installers are transferred according to seniority within index and within communications systems.

6. Article 13, Section 2.91 also provides that employees selected for permanent transfer with more than fifteen years service may elect termination of employment in lieu of transfer.

7. Article 7 of the agreement provides for a grievance procedure. Grievances are to be filed within ninety days of the action which gave rise to the grievance. Grievances not settled on the local level may be transferred to the national level.

8. If the national level of the union and the company are unable to settle a grievance, such grievance may be subject to arbitration in accordance with Article 8 of the agreement.

9. Article 8 provides that any arbitration decision will be final.

10. As a result of divestiture, AT&T has reduced the number of installers from approximately 30,000 in 1971 to less than 10,000 in 1986.

11. As part of this reduction in force, in July 1984 AT&T notified approximately 600 installers nationwide, including plaintiffs and 20 other New Orleans-area installers, that they were being transferred to New York City.

12. Plaintiffs, Bernard Saladino and Robert Mayo were

Index 3 installers.

13. Plaintiff, Gerald R. Daugherty, was an Index 4 instaler qualified in TSPS communications systems.

14. Plaintiff Jules Lodriguss was an Index 5 installer qualified in the Toll Carrier Narrow Band - Broad Band System.

15. On July 29, 1984, Daugherty filed a grievance challenging the decision by AT&T to transfer him permanently to New York City on the grounds that the transfer violated Article 13, Section 2.91 of the collective bargaining agreement because his skill level and communication system experience were not required in New York City.

16. Daugherty's grievance was handled by CWA Local 10490 through the first four levels of the grievance procedure. In September, 1984 it was transferred to the national union. There, the grievance was read and cataloged. Relevant contract provisions were reviewed. Affidavit of A. D. Walker, national representative for the installation bargaining union of the CWA, (Walker Affidavit) p. 6.

17. On September 28, 1984, Walker met with AT&T management to discuss the agreement. AT&T rejected the grievance and maintained that Daugherty had been selected in accordance with Article 13 of the collective bargaining agree-

ment. Walker Affidavit, p. 8.

18. Walker and CWA have interpreted Article 13, Section 2.91 to permit AT&T to transfer employees by inverse order of seniority, as long as their skills can be utilized at the destination location, and for index 4 and 5 installers, as long as their communication system is utilized at the destination location. Walker Affidavit, p. 9.

19. Walker also met with Raymond Murray, Assistant National Director for the Installation Bargaining Unit of CWA, in regard to the Daugherty grievance. Murray confirmed Walker's interpretation of Article 13, Section 2.91. Walker Affidavit, p. 9.

20. Walker also reviewed Daugherty's term of employment, index level, and communication system. Walker concluded that Daugherty did not have greater seniority than others in New Orleans within his skill category, that his skill category could be utilized in New York, and that his communication system was utilized in New York. Walker Affidavit, p. 9.

21. At the conclusion of the grievance procedure CWA determined that the grievance lacked sufficient merit to warrant arbitration. Walker Affidavit, p. 8.

22. On October 11, 1984, plaintiffs, Salandino (sic), Lo-

driguss, and Mayo filed a grievance claiming that they were selected for transfer to New York City without a prior determination that their skills were not required in New York.

23. The Saladino - Lodriguss - Mayo grievance was processed by CWA Local 10490 through the first four levels of the grievance procedures. Walker Affidavit, p. 7.

24. In December 1984, the grievance was transferred to the national union. There the grievance was read and cataloged. Relevant contract provisions were reviewed. On March 25, 1986, Walker met with AT&T management to discuss the grievance. AT&T rejected the grievance and maintained that the employees had been selected for transfer in accordance with Article 13 of the collective bargaining agreement. Walker Affidavit, p. 7.

25. Walker reviewed the employees' terms of employment, index level and communication systems. Walker concluded that the employees did not have greater seniority than others in New Orleans within their respective skill categories, that thei skill categories could be utilized in New York and that Lodriguss' communication system was utilized in New York. Walker Affidavit, p. 11.

26. Walker also reviewed the grievance with the CWA

Installation National Director, two CWA Vice Presidents and CWA legal counsel. Walker Affidavit, p. 12.

27. At the conclusion of the grievance procedure, Walker determined that the grievance lacked sufficient merit to warrant arbitration. Walker Affidavit, p. 8.

28. Neither plaintiff, Collins Ferrandez, nor plaintiff, Clifford Anderson, filed a grievance.

29. Plaintiffs have filed the Affidavit of Stanley L. Isidore (Isidore Affidavit) to the effect that at a meeting held in New York City in July 1984 for installers slated for transfer, a company official stated that installers were not needed in New York City.

30. Plaintiffs elected termination rather than to accede to the transfer.

REASONS

1. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, provides that federal courts have jurisdiction to examine alleged violations of collective bargaining agreements:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having juris-

> diction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

2. A section 301 claim, such as plaintiffs seek to bring here, must satisfy two requirements: (1) the employees must not only show that there was violation of the collective bargaining agreement; (2) but must also demonstrate that the union breached its duty of fair representation. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed. 2d 231 (1976); Sturgeon v. Airborne Freight Corp., 778 F 2d. 1154 (5th Cir. 1985). In this case, plaintiffs have proved neither a violation of the contract nor a breach of the duty of fair representation.

BREACH OF CONTRACT

3. Article 13, Section2.91 of the collective bargaining agreement obligates AT&T to select for permanent transfer surplus workers in any area for movement to a destination location where a scarcity exists by inverse order of seniority provided that they possess the skills and index category required.

4. The Walker Affidavit establishes that the union made a determination that the skill levels of plaintiffs could be utilized in New York City and that the communications systems on

which plaintiffs Daugherty and Lodriguss were trained were utilized in New York.

5. The Walker Affidavit also establishes that he was advised that AT&T concurred in the union's interpretation that no contract violation existed.

6. The Affidavit of Stanley I. Lee (sic), stating that he was told that installers were not needed in New York City, does not establish on the other hand, that the skills of the transferred employees were not required in New York.

7. Therefore, the argument that the skills of the plaintiffs were not needed at the destination location and that the transfers constituted a violation of the collective bargaining agreement is rejected.

BREACH OF DUTY OF FAIR REPRESENTATION

8. A union's duty to represent includes an obligation to serve the interests of the members without hostility or discrimination, to exercise its discretion in good faith, and to avoid arbitrary conduct. Vaca v. Sipes, 386 U. S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967).

9. A union cannot arbitrarily ignore or give only perfunctory review to a grievance. Vaca v. Sipes, 386 U.S. at 191.

10. Thus, CWA had a duty to investigate in good faith

plaintiffs' grievances regarding their notices of transfer.

11. If CWA failed to investigate the grievances in good faith, or if the union arbitrarily or improperly refused to process the grievance, it breached its duty to plaintiffs and violated Section 8(b) (1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America v. NLRB, 368 F. 2d 12, 17 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).

12. Plaintiffs' only allegations concerning a breach of the duty of fair representation by CWA is that the Union's failure to arbitrate plaintiffs' grievances constituted a breach of the duty of fair representation.

13. However, a failure to arbitrate a grievance does not amount to perfunctory or arbitrary treatment. A union's broad discretion in prosecuting grievances includes the right to settle the dispute short of arbitration. Turner v. Air Transport Dispatchers' Association, 468 F. 2d 297 (5th Cir. 1972).

14. Furthermore, the Walker Affidavit demonstrates that CWA and AT&T did in fact investigate and ascertain the merits of plaintiffs' grievances.

15. Since the union's conduct toward plaintiffs was

neither arbitrary, discriminatory, or in bad faith, plaintiffs' claims must be dismissed.

FAILURE TO FILE GRIEVANCE

16. Neither plaintiff, Fernandez, nor plaintiff, Anderson, filed any grievance against defendant, AT&T in connection with their proposed transfer. Before initiating judicial proceedings relative to a collective bargaining agreement, a plaintiff must first have sought to exhaust his remedies under the agreement. Republic Steel v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed. 2d 580 (1965). [1] Since plaintiffs did not institute the grievance procedure of the collective bargaining agreement regarding their claims against AT&T, their claims must be dismissed. Accordingly,

IT IS THE ORDER OF THE COURT that judgment be entered in favor of defendants, AT&T Technologies, Inc. and

---

[1] While a grievant may file suit without fulfilling the exhaustion requirement if there is a wrongful failure to process the grievance, the employer's conduct amounts to a repudiation of the contract's remedial procedures, or exhaustion would be futile because of the lack of an impartial decision maker, Eitmann v. New Orleans Public Service, Inc. 730 F. 2d 359, 362 (5th Cir.), cert. denied, 469 U.S. 1018 (1984), there have been no allegations concerning wrongful conduct or lack of impartiality in this case.

Communications Workers of America dismissing the claims of plaintiffs, Gerald R. Daugherty, Bernard Saladino, Robert Mayo, Jules Lodriguss, Collins Fernandes and Clifford Anderson at plaintiffs' cost. Judgment will be so entered.

New Orleans, Louisiana, this 14th day of January, 1987.

/s/ Frederick J. Heebe
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
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APR 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1533

In the Supreme Court of the United States

OCTOBER TERM, 1987

GERALD R. DAUGHERTY, ET AL
Petitioners

v.

AT&T TECHNOLOGIES, INC. and
COMMUNICATIONS WORKERS OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AT&T TECHNOLOGIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION RESTATED

Whether the Federal District Court for the Eastern District of Louisiana properly granted both Defendants summary judgment pursuant to FRCP 56, thereby dismissing Plaintiffs' hybrid Section 301/duty of fair representation claims, because Plaintiffs failed to raise any material fact issue regarding a breach of the collective bargaining agreement and failure in the Union's duty of fair representation.

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STATUTE:

Labor Management Relations Act, 29 U.S. § 185....2

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OPINIONS BELOW

The opinion of the court of appeals is an unreported unanimous panel decision issued pursuant to FRAP 47.6. The decision is included in Petitioners' Appendix at page 22. The opinion of the District Court is also unreported and is included in Petitioners' Appendix at pages 24-35.

JURISDICTION

Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). The decision of the Court of Appeals was dated and entered on October 13, 1987. The Clerk's office received the typed copy of the Petition on January 11, 1988. It was returned to Petitioners' counsel because it failed to comply with the Rules. A printed

Petition was mailed to the Court in February. This was also returned due to the failure to comply with the Rules.

Finally, over 60 days after the due date for a timely Petition for a Writ of Certiorari (Supreme Court Rule 20.1), on March 15, 1988, the Clerk of Court received a proper Petition. This Petition varied substantively from the original submission in numerous respects. Arguments advanced in the Petition filed on March 15, 1988 were not included in the original submission. Respondent submits this Petition is untimely and therefore should not even be considered. For this and the reasons set forth hereinafter, the Petition should be denied.

STATUTORY PROVISIONS

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners filed their civil action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, against their former employer, AT&T Technologies Inc. (AT&T) claiming their selection for forced transfer violated the applicable terms of the collective bargaining agreement which admittedly covered their employment. Plaintiffs also sued their collective bargaining representative, the Communications Workers of America, (CWA or

Union) claiming the Union had failed to represent the Petitioners fairly when it decided not to take their grievances to arbitration. The district court, shortly before the scheduled trial of the matter, granted summary judgment to both defendants finding the actions taken by the employer were not in violation of the applicable collective bargaining agreement and, further, that there was absolutely no evidence the Union had breached its duty of fair representation to the Petitioners. Petitioners timely appealed the judgment of the district court. After hearing oral argument, the Fifth Circuit affirmed the decision.

REASONS FOR DENYING THE PETITION

In this Court, Petitioners simply reurge factual claims raised and fully considered by both the district court and the court of appeals. There is no substantial legal issue involved in this case. The Fifth Circuit's decision neither possesses national importance nor is it otherwise review worthy. Both of the lower courts properly applied the law to the undisputed facts. There is no reason for further review of this matter. Respondent AT&T Technologies Inc. respectfully requests this Court deny the Petition for a Writ of Certiorari in this case.

Moreover, this case does not involve any conflict among the courts of appeals, nor does the Petition raise any significant issue of federal law. The Petition does not state any reason why this Court should exercise jurisdiction over this matter. In fact, the Petition fails to refer to any of the reasons listed in Supreme Court Rule 17 as considerations supporting the issuance of a writ of certiorari. Nor does the Petition contain any argument as to the importance of the case. Petitioners have not identified any error of law made by the lower courts. There is absolutly no reason for this Court to exercise its supervisory jurisdiction over this case.

Since this Court's decisions in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967), and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 2311 (1976), the law applicable to cases of this nature has been understood and routinely applied by the lower federal courts. The Fifth Circuit has consistently followed the principles established by this Court. *See, e.g., Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154 (5th Cir. 1985); *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

In this case, the district court properly applied these well established principles in denying Petitioners' claims. Citing *Hines v. Anchor Motor Freight, Inc., supra*, the court properly held the Petitioners were required to satisfy two requirements to establish a Section 301 violation: 1) a breach of the collective bargaining agreement; and 2) a breach of the duty of fair representation by the union. (Petitioners' Appendix at p. 31). Petitioners have not challenged the applicability of this principle.

On the contract violation issue, Petitioners appear to argue the district court misinterpreted the applicable collective bargaining agreement. There was no dispute over the wording of the contract. The district court's decision was based directly on the uncontradicted affidavit of the union official responsible for handling the grievances filed by the Petitioners. The affidavit established that both the company and the Union concluded the contract had not been violated. (Petitioners' Appendix at pp. 31-32). Petitioners' argument is nothing more than a claim that their interpretation of the contract is correct and the joint company/union interpretation is erroneous. Before the lower courts, as here, Petitioners offered their own contract interpretation; however, they offered no evidence supporting their interpretation. Both lower courts rejected this

argument based on the record evidence.

The district court also correctly held there was absolutely no evidence suggesting the Union breached its duty of fair representation in deciding not to pursue Petitioners' grievances to arbitration. Petitioners argued below the Union processed the grievances in a "perfunctory" manner. However, Petitioners did nothing to contradict the affidavit of the Union official who handled these grievances detailing how the grievances were processed, investigated, and discussed with the company. After this process the Union decided not to pursue the grievance to arbitration. While Petitioners make a conclusory argument this was a breach of the Union's duty of fair representation, they offered no evidence showing the Union's decision not to pursue the grievance was anything other than a good faith interpretation of the contract language.

The district court was presented with a sworn affidavit from the CWA official who processed the grievances detailing the steps taken to investigate the claims and describing the CWA's reasons for deciding not to pursue the matter to arbitration. Petitioners offered absolutely no evidence challenging the affidavit or suggesting any misconduct or impropriety in the CWA's handling of the grievances. Rather than offering specific evidence pursuant to FRCP 56, the Petitioners offered conclusory arguments that the Union "rolled over and played dead" when it decided not to arbitrate the dispute. The Union's good faith refusal to arbitrate a grievance in not a breach of its duty of fair representation. *Vaca v. Sipes, supra.* Again, Petitioners do not challenge the lower court's application of this settled principle, nor do they ask this Court to reconsider this standard.

CONCLUSION

The Petition for Writ of Certiorari in this matter is untimely and should therefore be rejected. Further, the Petitioners fail to raise a single significant legal issue. There is absolutely no reason for this Court to exercise supervisory jurisdiction over this matter. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Brief for AT&T Technologies, Inc. in Opposition to Petition for Writ of Certiorari has been served upon all counsel of record by placing a copy of the same in the United States Mail, properly addressed, postage prepaid on this ____ day of _____, 1988.

_____

KEITH M. PYBURN, JR.

Supreme Court, U.S.
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v.

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COMMUNICATIONS WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

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BRIEF IN OPPOSITION FOR RESPONDENT COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

REASONS FOR DENYING THE WRIT

This is an ordinary "hybrid § 301/fair representation" action brought under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185. *See DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983). The petitioners, plaintiffs below, claim that their employer, AT&T Technologies ("AT&T"), has violated its collective bargaining agreement with the Communications Workers of America ("CWA") by transferring the petitioners from New Orleans to New York City, and that the CWA has violated its duty of fair representation by refusing to take the petitioners' grievances to arbitration.

The petition for certiorari makes no attempt to show that this case is worthy of the Court's consideration. Indeed, the petition is taken up entirely with an attempt to show that Art. 13, § 2.91 of the agreement did not authorize AT&T's decision to transfer the petitioners to New York City. That section of the agreement provides that AT&T may select for transfer employees "who have the skills as determined by the Company in the skill category required at the destination location. . . ." Pet. 2-3. The courts below determined, as had the company and the union, that the petitioners' transfer to New York City was authorized by this section of the agreement. Pet. App. 22, 31-32. This Court does not sit to resolve grievances under the AT&T/CWA agreement.

Questions of contract interpretation such as that raised by the petition for certiorari are committed to arbitration by the collective bargaining agreement. An employee covered by this agreement "may seek judicial enforcement of his contractual rights" without exhausting the agreement's grievance and arbitration procedures only if "the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967) (emphasis in original). The petitioners do not even attempt to show that CWA's refusal to arbitrate their grievances was "wrongful." At most, they differ with the union's assessment of the merits of their grievances, Pet. 17-18, but, as *Vaca* holds, that is not sufficient to establish a breach of the fair representation duty. 386 U.S. at 192-193. The petitioners do not challenge the district court's finding that "CWA and AT&T did in fact investigate and ascertain the merits of the plaintiffs' grievances" before deciding not to proceed to arbitration. Thus, not only is the contract question presented by the petition intrinsically unworthy of this Court's attention, it is on its face not judicially cognizable at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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GERALD R. DAUGHERTY, ET AL,
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versus

AT&T TECHNOLOGIES, INC. AND
COMMUNICATIONS WORKERS OF AMERICA
Respondents

REPLY OF PETITIONERS

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IN THE

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GERALD R. DAUGHERTY, ET AL,
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versus

AT&T TECHNOLOGIES, INC. AND
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Respondents

REPLY OF PETITIONERS

MAY IT PLEASE THE COURT:

Respondent AT&T is correct that changes were made in the final petition. However, these changes were not, as Respondent complains, substantive. They consisted of deleting a summary part of the Statement of the Case; inserting Item 7 under the Statement of the Case; adding emphasis at Item 15 under the Statement.

The Summary of the Agreement was expanded; no change

was made in the Agreement; a Conclusion was added.

No new arguments or authorities were added; no new substantive material was added.

Petitioners suggest that they be allowed to substitute an exact copy of the Petition received January 11, 1988 for that received March 15, 1988. Further, that the origin of the problem of form is in financing the printing costs from among 3 petitioners (now in reduced circumstances) and a sole practitioner not fully aware of Rule 33.7. Accordingly, if the Court be inclined to sanctions, it is respectfully suggested that the expense of reprinting (the fourth time) be sanction enough.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served the below listed parties by U.S. mail, first-class postage prepaid, with three (3) copies each of the foregoing:

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